IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 79 of 1989

KALU RAM
V/S
DHARNIDHAR & ORS.

Mr. MANISH SHISHODIA & Mr. RAJESH CHOUDHARY, for the appellant / petitioner

Mr. DALPAT RAJ BHANDARI, for the respondent

Date of Order : 15.11.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This second appeal has been filed by the defendant, against the judgment & decree of the two learned courts below, decreeing the plaintiff's suit for eviction.

The facts of the case are, that on 27.9.1965 the plaintiff Dharnidhar and his sons filed a suit for ejectment and arrears of rent, against the defendant, alleging interalia that the property described in para-2 of the plaint is situated in village Rid. It was ancestral property belonging to Hiralal, Moolchand, Nandram sons of Mohanlal Patodi and Nemi Chand s/o Pusalal and Mst. Mani widow of Mangilal Patodi. Out of which Pucka portion fell to the share of Mohanlal's sons, and the Kacha portions situated in the east fell to the share of Mani and Nemi Chand. It was then alleged that the three sons were

judgment debtors in a decree in favour of firm Shah Shivlal Kishanlal, and in execution thereof the aforesaid property of the three sons was attached. However regarding Kucha portion, the objection of the brothers was accepted and that was released from attachment and the remaining portion was put to auction, wherein, with the permission of the Court, the decree holder purchased the said property, and the sale certificate was issued on 26.11.1934. According to the plaintiff after the said sale, the decree holder got possession of the purchased portion, and it was later on let out to the defendant at yearly rent of Rs. 8/-. According to the plaintiff the eastern Kucha apartments were also taken on rent by the defendant earlier, but subsequently, on 28.2.49 he purchased them from Nemichand and Mani, and in that sale deed it is recited, that in the west of the property is situated the property of the brothers of the sellers. According to the plaintiff some rent was paid and entries thereof were made in the books of accounts. However, some amount of rent is claimed as outstanding. It was alleged that the suit property was subsequently sold by firm Shivlal Kishanlal to the plaintiff, vide registered sale deed dt. 30.4.65, and since the plaintiff requires the premises, the tenancy was terminated, and the suit for eviction was filed. It may be mentioned here that in the village, where the property is situated, the provisions of Rajasthan Premises (Control of Rent and Eviction) Act are not applicable, whether at the

time of filing of the suit or even till today.

This suit was subsequently amended with appropriate permission of the court, and by that amendment para-4 of the plaint was amended, and a stand was taken about the tenancy of the defendant being under a rent note of Savan Vad 13 Samvat 1992, while in the original plaint the tenancy was pleaded to be oral and to have commenced on Bhadwa Vad 13 Samvat 2004.

The defendant filed written statement, to the original plaint as well as to the amended plaint. In the written statement to the amended plaint, replying para-2 relating to description of property, all that was pleaded was, that from the pleading it is not clear as to what apartments are taken by the plaintiff to be Pucka, and what apartments to be Kucha, and therefore, the plaintiffs should be called upon to produce the map, according to scale. Then, it was pleaded, that the defendant is in possession of the property for the last 40 years, and neither any possession was demanded from him by anybody, nor did he deliver possession to anybody. It was pleaded that the defendants are in possession of the property since ancestors, and since much before the sale certificate. Execution of the rent note was denied. It was denied that it bears any signature of anybody, the written rent note was also denied, and it was pleaded that the defendant is

continuing in possession since the time of his ancestors as owners, and has perfected his title by adverse possession, and that the rent note produced by amending the plaint is a forged document, which is neither stamped nor registered. It was pleaded, that in the original plaint the tenancy was pleaded to commence from Bhadva Vad 13, 2004 but by amendment the tenancy is pleaded to commence from Savan Vad 13, Samvat 1992. It was also pleaded that since the rent note reserved yearly rent, it was required to be registered, and being unregistered, it is not admissible in evidence. Then, it was pleaded that the defendant did have transactions with firm Shivlal Kishanlal, and had account in their books. Then, it was pleaded that the rent which is said to be deposited does not relate to the suit property, but it relates to other property which is situated on the west of Nohra of Uda Ram, and was in tenancy of the defendant from Samvat 2002 to 2017, which had been delivered back. It was pleaded that the plaintiff Dharni Dhar nurses a grudge against the defendant, and in order to grab the property, the plaintiff has filed the false suit. According to the defendant in the east of the property of Dharni Dhar is situated the property of defendant, and there is no property of deceased Mohanlal, or his heirs, nor any such property was purchased by Shivlal Kishanlal, nor could it be sold to Dharni Dhar. Other pleadings were also denied. In additional pleas it was pleaded, that the defendant is continuing in possession for the last 40

years, and has perfected the title by way of adverse possession. It was also pleaded that the defendant's father Ridh Karan was alive in Samvat 1992, and it does not stand to reason, as to why the signatures of younger brother Chothmal were obtained on rent note. Various other pleadings were also taken.

The plaintiff filed a rejoinder, maintaining that the defendants have purchased the property from Nemi Chand and Mani, and therein the suit property has been described to be of the firm. It was also pleaded that if the defendant is in possession for the last 40 years, it does not stand to reason, that he would not be aware of the auction, and the sale certificate, rather the entire property was got attached by Gordhanlal, out of which Nemi Chand and Mani got certain portions released by filing objection, as is mentioned in the sale certificate. Thus the defendant is fully aware of the sale of the apartments. It was maintained that there is no inconsistency in the pleadings. Then, it was pleaded that the receipt of payment of rent relates to the suit property itself, as in the west of Nohra of Udai Ram there is no construction, nor was it ever taken on rent. Various other pleadings of the plaint were maintained, and the stand of the defendant about adverse possession was denied, and the recitals in the sale deed of 1949 were reiterated. It was pleaded that at that time all transactions used to be signed by Chothmal, and

therefore, the rent note was got signed from Chothmal.

Learned trial court framed seven issues. Issue no. 1 was as to whether the property was taken on rent by Chothmal as a Karta of Khandan of Ridhkaran, on Savan Vad 13 Samvat 1992. Then, issue no. 2 was as to whether the defendant paid rent upto Bhadva Vad 13, 2017 which is entered in the books of accounts of Shivlal Kishanlal. Then, issue no. 3 was about validity of notice terminating the tenancy. Then, issue no. 4 was about the plaintiff having purchased the property from Shivlal Kishanlal, while issue no. 5 was about admissibility of the rent note for want of stamp, and registration. Then, issue no. 6 related to limitation, and issue no. 7 was about relief.

Learned trial court after completing the trial decreed the suit. Deciding issue no. 1, the rent note Ex. 5 was found to be proved, and the tenancy was found to have been determined on the death of Chothmal. Then, deciding issue no. 2 also, the entries of books of accounts, being Ex.-4, Ex. 23, and Ex.24 etc. were believed, and found to be proved, whereby the rent was paid. Then, the other issues were also decided in favour of the plaintiffs.

In appeal, the judgment and decree was assailed on the ground, that the learned trial court was in error in allowing amendment of the plaint, about the defendant being

in adverse possession for the last 40 years, suit being time barred, rent note being forged, and the rent note Ex.-5 having not been proved, as it did not come from proper custody, nor the identity of its scribe etc. has been shown. Then, it was contended that the sale certificate is not proved. Learned lower Appellate Court negatived these contentions, and interalia found, that the application for amendment of the plaint was allowed vide order dt. 31.8.1967, subject to payment of cost of Rs. 30/-, and the defendant received the amount of cost without any protest, therefore, the defendant is estopped from assailing the order allowing the amendment of the plaint. Then, notwithstanding the limited arguments made, the learned lower Appellate Court considered all the issues, the findings on issue no.1, and 2 were confirmed. Then, the findings on issues no.3, 4 and 5 were not pressed. Then, issue no. 6 was also decided in favour of the plaintiff by affirming the finding.

The present appeal was admitted vide order dt. 6.7.1989, by framing following two substantial questions of law :-

> 1. Whether lower courts were right in decreeing the suit for whole of the premises much beyond the property alleged to have been let out, without determining the boundaries of the demised property?

2. Whether the lower courts are right in holding that there existed relationship of landlord and tenant in respect of the suit premises between the parties and the plaintiffs have a right to sue?

Arguing the appeal, learned counsel for the appellant pressed both these questions, and submitted that since the plaintiff has failed to prove the precise boundaries of the property said to have been let out, and when the defendant is purchaser of part of the ancestral property from two of the co-sharers, being Nemichand and Mani, it was necessary for the plaintiff to prove the precise boundaries of the property, said to have been let out, in order to get the decree. Then, arguing the second question it was contended that the plaintiff has originally come with the plea of oral tenancy commencing from Samvat 2004, while later on by getting amendment of the plaint, the plaintiff shifted his stand to that of a written contract of tenancy, and commencement of tenancy to be from Samvat 1992, which clearly shows, that as a matter of fact there was no tenancy, and there was no relationship of landlord, and tenant between the parties. It was also submitted that rent note Ex.-5 has not been proved in accordance with law, and learned courts below are in error in decreeing the suit on that basis. It was also contended that the defendant's consistent case, all through, was that the defendant is in possession of the property for the last more than 40 years as owner, and continuously, with the

result, that the defendant has perfected his title by way of adverse possession, and simply because the plaintiff got a sale deed executed from the firm Shivlal Kishanlal, the present suit could not be maintained.

Learned counsel for the respondent, on the other hand, supported the impugned judgment.

I have considered the submissions, and have gone through the record.

Coming to the first substantial question of law as framed by this Court, in my view, this question does not at all arise in the present appeal, for the simple reason, that a combined reading of the plaint and written statement, original as well as amended, does show, that the defendant did not raise any controversy on this aspect, at any point of time, inasmuch as all that was pleaded in the written statement was, that it is not clear as to what plaintiff comprehends by Kucha apartments, and Pucka apartments, and the defendant simply denied any attachment or auction of any property, or any sale certificate having been issued, but then the defendant never joined controversy, about the exact dimensions of the property sold vide Ex.-1, or about the property being in his possession, rather the only case of the defendant was, about being in adverse possession. In my view, that being

the position, when there was no controversy raised by the defendant, about the boundaries of the property, or identity, or details of the apartments, by contending the same to be, whether less or more, about the apartments with him, it cannot be said, that the question as framed by this Court at all arise in the present appeal. The question is, therefore, answered accordingly, against the appellant.

So far the second question is concerned, a look at the findings of the learned courts below show, that they have concurrently believed, not only the rent note Ex.-5, but also the attending circumstances, of the defendant having paid rent, and the same being entered in the books of accounts of firm Shivlal Kishanlal, being Ex. 4, Ex.23, Ex.24 and Ex.25 etc. It is significant to note, that Madho Lal P.W.2 has clearly deposed that the appellant approached him to persuade the firm to sale the house to him, but since the price offered by the defendant was not agreeable, the bargain did not materialise. His evidence is corroborated by the evidence of P.W.3 and P.W.4. Then, P.W.5 has proved the writing A to B on Ex.-5 to be of Mathuralal and has also proved the writing C to D being in the hand of Mool Chand, while the writing E to F and writing G to H and I to J have been proved to be in the hand of Askaran. He has also deposed that Askaran and Mool Chand were Munims. Then, a look at the statement of this P.W.5 shows, that on the above testimony there is no

material cross examination, inasmuch as all that he has been asked is, that Askaran has died some 7-8 years ago, and that rent note was not executed in his presence. That apart P.W.4 has also proved Ex.-5, by deposing that writing A to B in Ex. 5 is in the hand of Mathuralal, who was in the employment of the firm, and had died. On this part of his evidence also, there is no cross-examination on the side of the defendant to assail the reliability. The defendant as D.W.10 has of course denied Ex.-5, so also the writing A to B to be of Mathuralal. However, from the above evidence of the plaintiff, in my view, it has rightly been found by the learned courts below that Ex.-5 is duly proved. Once Ex.-5 is found to be proved, that sufficiently establishes the relationship of the landlord and tenant between the parties, it is a different story, that considering issue no.2, learned lower Appellate Court has found, believing the evidence of P.W.3, and P.W.4 etc. that the defendant had made payment of rent as contained in various entries of the books of accounts, and it has also been considered in detail, that the payment of rent relates to the suit property only. Learned lower Appellate Court has recorded a positive finding, that on comparative appreciation of evidence of either side, it is found, that the evidence led on the side of the plaintiff is more strong and reliable, and is duly corroborated by documentary evidence as well. In my view, thus the learned courts below have found, that the relationship of the

landlord and tenant did come into existence between the parties, and that finding is duly supported by evidence, oral as well as documentary, including rent note and receipts of payment of rent. It may also be noticed here, that it has rightly been found, that admittedly the defendant claims to have purchased the property, from other sharers by registered sale deed Ex.A-1, and a bare look thereat shows, that therein the property demised has been described by boundaries, and in west of the property, has been described to be the boundary of property of firm Shivlal Kishanlal. This recital in Ex.A-1 gives a deadly blow to the story of the defendant, about his adverse possession, so also to any possible controversy about the identity of the property etc., and since as deposed by P.W.4 and 5 that it was defendant who approached them to persuade the firm to sale the property to him, but the deal could not be struck, as the price offered by the defendant was not accepted, the property was sold to the plaintiff by registered sale deed. Obviously therefore, the plaintiff thus got a right to file the suit as landlord.

The obvious consequence of the above discussion is, that the question no. 2 is also required to be, and is, answered against the appellant.

The appeal thus has no force, and is dismissed. Parties shall bear their own costs.

(N P GUPTA),J.